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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

TARLTON AND SON, INC., Employer/Respondent, And ROBERT MUNOZ, An Individual/Charging Party.	Case No. 32-CA-119054 **CHARGING PARTY'S ADDITIONAL POSITION STATEMENT**

Pursuant to the Board's Order of November 21, 2018, the Charging Party files this position statement. Counsel for General Counsel has already filed a Position Statement. We respond in part to that Statement, which is nothing less than abdication of General Counsel's responsibility to enforce Section 7 rights.

On review, the Ninth Circuit entered an Order on July 19, 2018, DktEntry 54, which "vacate[d] and remand[ed] in full petition Nos. 17-70532, 17-70632, and 16-71915." The Court did not vacate the Board's decision; it vacated the "petition." Sorry, General Counsel and Board. The Decision remains in full force and effect. Because the Petitions were vacated and remanded, the Board may decide whether it has authority to modify the Decision pursuant to 29 U.S.C. § 160(e). But the Decision was not vacated!

At issue are two questions:

1. Is there any impact of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)?

2. What is the impact, if any, of the decision in *The Boeing Co*., 365 NLRB No. 154 (2017)?

The Board should reaffirm its prior decision in full. Alternatively, it should remand to the Administrative Law Judge for further hearings on whether there is a business justification for the Forced Unilateral Arbitration Procedure a/k/a Mutual Arbitration Policy.

I. THE IMPACT OF *EPIC SYSTEMS* IS NARROW

In each of the three cases in the Supreme Court, *Epic Systems Corp. v. Lewis*, above; *Ernst & Young LLP v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA, Inc*., No. 16-307, there were pending statutory collective actions under the Fair Labor Standards Act and, in particular, collective actions as authorized by 29 U.S.C. § 216(b). The Supreme Court, relying on the arbitration policy contained in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 2, 3 and 4, held that the FAA prevailed over the terms of the National Labor Relations Act ("NLRA"), that the statutory collective action in that case created by the statute would be waived under the Federal Arbitration Act and that the National Labor Relations Act did not override that provision. Although that was not a "class action," the Court was clear that the same principle would apply to a class action brought under Federal Rule of Civil Procedure 23. That is the limited holding of the Court. It addressed nothing else. The Court, for example, did not address the right of two or more employees to bring the same claims to the Department of Labor to investigate or to file a joint lawsuit that did not seek statutory collective action status or class action status.

The Board has recently dismissed cases relying on *Epic Systems*. See, e.g., *Northrop Grumman Sys. Corp.*, 366 NLRB No. 147 (2018); *Kellogg, Brown & Root, LLC*, 366 NLRB No. 153 (2018); and *Exeter Fin. Corp*., 366 NLRB No. 151 (2018). What is, however, significant about each of these cases is that the Board expressly relies upon the limited nature of *Epic Systems*, which only addresses "whether employer-employee agreements that contain class -

and collective-action waivers" violate the National Labor Relations Act. *Northrup Grumman*, slip op. at 1; *Kellogg, Brown & Root*, slip op. at 1; *Exeter Fin.*, slip op. at 1. Thus, the Board has affirmed that *Epic Systems* is limited in its application to only those circumstances.

Nothing in *Epic Systems* attacks or undermines the basic proposition established by the Board in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015), *affd.*, ___ U.S. ___ (2018), and *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied in part*, 737 F.3d 344 (5th Cir. 2013), that bringing claims to government agencies and courts has been and will continue to be protected concerted activity. That fundamental proposition was not disturbed. The principle created in *Epic Systems* was that the National Labor Relations Act does not extend to requiring employers to allow matters to be brought as statutory collective actions or as class actions under the Federal Rules of Civil Procedure.

And even more narrow is that this exception only governs where the Federal Arbitration Act applies to the arbitration procedure that waives the right to bring such claims.

Nothing in *Epic Systems* undermines the multiple cases in which the Board has upheld the right of employees to concertedly pursue claims and disputes outside of the workplace and, in particular, to investigatory bodies, adjudicatory bodies, and legislative entities. The Supreme Court interpreted the phrase "mutual aid and protection" which is the heart of Section 7 as extending and including protection for concerted activities "outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). As long as the activity is concerted, the employees' action is protected. *See Meyers Indus.*, 281 NLRB 882 (1986). Thus, even initiating group action or action that is the logical outgrowth of group action is protected. *Salisbury Hotel*, 283 NLRB 685, 686-687 (1987). The *Developing Labor Law* has string cites of such cases. See Higgins, *Developing Labor Law* 6-175-177 (7th Ed. 2018). See very recently *Murray Am. Energy, Inc.*, 366 NLRB No. 80, slip op. at 11-13 (2018).

In summary, an arbitration agreement may purport to waive consolidation, group action, individual action as an outgrowth of group action, consolidation action, two employees together, or any form of concerted action, but such action cannot be waived by an arbitration agreement

unless it involves a statutory collective action or a class action under Federal Rule of Civil Procedure 23 and the arbitration agreement that waives that right is governed by the Federal Arbitration Act.

Epic Systems particularly noted that the statutory collective actions and the Federal Rules of Civil Procedure were statutory creations after the National Labor Relations Act was enacted. In California, where this case arises, the reverse is true. The statutory class action was initially and originally enacted in 1872 as part of the so-called Field Code. See Cal. Code of Civ. Proc. § 382. The right of individuals to join others in actions has also been part of the law since 1872. See Cal. Code of Civ. Proc. § 378. Furthermore, for example, the California Labor Commissioner has entertained claims and investigated such claims since the Nineteenth Century in California. The Legislature created the first Labor Commissioner position when the first Bureau of Labor Statistics was approved in 1883. 1883 Cal. Stat. 27-30. See generally Eaves & Sackman, *A History of California Labor Legislation* (2012). Thus, *Epic Systems*' reliance on the newly created rights under federal law is not applicable in California, for these collective rights have existed since the Nineteenth Century.

The General Counsel concedes as much by asking the Board to overrule precedent going back as far as 1942. See footnote 2 in General Counsel's Brief. In effect, the General Counsel suggests that concerted activity of taking a matter in dispute such as safety, overtime, family leave, veterans' rights, and discrimination to any agency is no longer concerted activity for "mutual aid or protection." This is a sweeping contention. That would effectively overrule *Eastex v. NLRB*, above.

Furthermore, the lawsuit in this case, as in many cases, was brought by more than one employee. In fact, three employees brought the lawsuit. Assuming that the court denied class action status, they still brought this as concerted activity, a consolidated matter. It is unlawful to interfere with their right to join together concertedly even if not a class action. Similarly, to the extent the lawsuit seeks injunctive or declaratory relief, it does so on an individual basis without the need for a class action. Federal Rule of Civil Procedure 65 similarly allows an individual to

seek injunctive relief that may affect others. Federal Rule of Civil Procedure 23(b)(2) would allow the court to grant injunctive relief against the conduct of a defendant employer whose conduct unlawfully affects all employees. The standards of class certification for a 23(b)(2) class action involve different standards and concerns. But an effort to stop an employer from violating labor protective laws would surely be concerted and "for mutual aid or protection." California law would allow the same type of injunctive relief. The broad sweep of the General Counsel's position would allow an employer to prohibit two workers from joining together in one lawsuit to remedy unlawful conduct against them or many employees.[1]

Finally, the filing of the lawsuit should be protected activity. It certainly relates to "wages, hours and other terms and conditions of employment." It is concerted. It is for "mutual aid or protection." Whether the subsequent effort to have a class certified is for "mutual aid or protection" is a different question and conflates "mutual aid or protection" with concerted. It is certainly concerted activity.

In summary, then, nothing in *Epic Systems* can be read to overrule *sub silentio* all the prior Board cases that protect the right of workers to bring their claims outside the direct employment relationship to state and federal agencies, whether administrative, legislative, judicial, the executive branch,[2] and even to the public's attention.

II. ***BOEING* REQUIRES EVIDENTIARY RECORD TO ESTABLISH A LEGITIMATE BUSINESS JUSTIFICATION FOR ANY RULE THAT RESTRICTS SECTION 7 ACTIVITY**

The Board held recently in *Boeing Co.*, 365 NLRB No. 154 (2017), reaffirmed, 366 NLRB No. 128 (2018), that an employer could establish a business justification for a rule that restricted Section 7 activity. Here, the employer failed to provide any such evidence to sustain its Forced Unilateral Arbitration Procedure (also called by the employer a Mutual

[1] The FUAP also interferes with the right of employees to refrain from Section 7 activity. They could not intervene in an arbitration proceeding to oppose the relief sought by one individual, which might affect them.

[2] For example, asking a district attorney to prosecute wage theft. Or asking a state attorney general or local authority to investigate working conditions. Or a workers center. Or another union.

Arbitration Procedure). But *Boeing Co.* applies to require such evidence. The Board may find that in light of *Epic Systems* an employer can prohibit statutory collective actions or class actions, but not other concerted action without evidence of the business justification to balance against the Section 7 rights of employees.

Here, the Charging Party will establish that the procedure, which includes, for example, discovery rights and other burdens and procedures, is exactly the opposite of arbitration as well as other administrative procedures available to employees to bring their claims. See *Sonic-Calabasas A., Inc. v. Moreno*, 57 Cal.4th 1109 (2013).

The Supreme Court has made clear that arbitration serves a different purpose than civil litigation. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer* (2008) 552 U.S. 346, 357-358 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)). The FUAP is unconscionable and contrary to the animating purposes of the FAA.[3]

The FUAP imposes immense obstacles to employees who want to redress workplace wrongs. There is no justification for such barriers except to effectively prohibit such concerted action.

In addition, Charging Party will prove that the real reason that the FUAP was implemented was to avoid any form of group action, including statutory collective and/or class actions. Because there is so much litigation in California because employers violate wage and hour laws and other employment laws, the real purpose is to avoid any group actions and not for

[3] See, e.g., *AT&T Mobility LLC v. Concepcion* 563 U.S. 333, 351 (2011) ("Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.... But what the[se] parties ... would have agreed to is not arbitration as envisioned by the FAA [and] lacks its benefits."); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*. 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."); *Mitsubishi Motors Corp.*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party ... trades the procedures and *opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration*." (Emphasis added.)); *Circuit City Stores, Inc. v. Adams* 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

any other legitimate business purpose. This is not restricted to class or collective actions. The FUAP applies to all agencies, courts, or any place or person where redress can be obtained. It would include the police to report theft or assault.

The policy interferes with the Religious Freedom Restoration Act because it prohibits employees from working through a religious organization for relief. In effect, it requires employees to use its procedure alone and would forbid employees from praying for help or relief concertedly.

The Board cannot decide the issues before this case without remanding the matter to the Administrative Law Judge to hear evidence by the employer and rebuttal by the Charging Party as to the business justification and the argument that there is no business justification.

III. THE BOARD MUST EXAMINE EACH ARBITRATION AGREEMENT TO DETERMINE WHETHER THE SAVINGS CLAUSE APPLIES

Assuming that the Federal Arbitration Act applies, something we contest in this case, the Board is forced to examine the effect of the savings clause. Section 2 of the FAA provides that such arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." California has applied its unconscionability doctrine in many circumstances to arbitration agreements. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83 (2000). The savings clause is a federal doctrine, and charging parties must be entitled to argue, and the Board must consider whether a particular arbitration agreement or any clause thereof is unconscionable or otherwise invalid under the savings clause. If it is not governed by the FAA, California law would find any such restrictions to be invalid. *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

Here, as we argued in our Cross-Exceptions, and as we have pointed out below, there are provisions in this particular arbitration agreement that are subject to the savings clause and an unconscionability argument. These will be presented in each case to the Board.

We recognize that the Board will attempt to avoid the application of the savings clause and state unconscionability (or federal unconscionability) doctrines to arbitration provisions.

Nonetheless, that's the result of the application of the Federal Arbitration Act under the Court's decision in *Epic Systems,* if it applies beyond statutory collective actions and class actions under the Federal Rules of Civil Procedure. Ultimately, a court of appeals will have the final say on that matter.

This principle is further heightened by the discussion above regarding the *Boeing Co.* case and the obligation of the employer to prove business justification.

The Board in other contexts has been forced to evaluate the impact of state law on Section 7 rights. E.g., *Olean Gen. Hosp.*, 363 NLRB No. 62 (2015); *Macerich Mgmt. Co.*, 345 NLRB 514 (2005), petition for review granted in part and denied in part sub nom., *United Bhd. of Carpenters v. NLRB,* 540 F.3d 957, 963 (9th Cir. 2008); *Fashion Valley Mall, LLC v. NLRB,* 42 Cal.4th 850 (Cal. 2007); and *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003) (all applying state law to access rights).

In summary, then, each term of each arbitration agreement including this FUAP will have to be examined to determine whether there are provisions that are subject to the savings clause and unconscionable or voidable under state law or federal law.

Here, the FUAP provides the arbitration "will be conducted under the Federal Arbitration Act and the applicable procedural rules of the American Arbitration Associaton." Those two phrases are contradictory since the FAA would preempt any rules of the AAA.[4] Moroever, there are rules of the AAA that are unconscionable such as requiring the employee to pay certain fees. Finally, not all disputes that an employee might have under the FUAP would be covered by the AAA. The FUAP covers all disputes. The AAA rules do not cover all disputes, only employment related claims.

IV. THE FEDERAL ARBITRATION ACT DOES NOT APPLY

There is no pending dispute other than the class action. The challenge is, however, to the maintenance of the FUAP as to the class action and to any other dispute.

[4] The FUAP adopts only the "applicable" rules, not the entire rules. The AAA rules do not provide that the employer can pick and choose.

First, there is an underlying class action. There is, however, no evidence that it impacts commerce.

Second, the remedy in this case would have to apply to future disputes on a theory that the arbitration provision is unlawfully maintained. We have argued extensively in the prior briefs why the Federal Arbitration Act does not apply.

Tarlton's position depends upon the application of the FAA, which does not apply. The FAA applies to "a contract *evidencing a transaction* involving commerce." 9 U.S.C. § 2 (emphasis added). The party claiming FAA preemption has the burden of proof to show the contract involves interstate commerce. *Woolls v. Superior Court*, 127 Cal.App.4th 197, 211-214 (2005). Tarlton has not met that burden. Moreover, Respondent is claiming that the FAA preempts state law, so Tarlton has the burden of demonstrating preemption – including the burden to prove that the agreement affects interstate commerce. See *ibid*.; *Lane v. Francis Capital Mgmt. LLC*, 224 Cal.App.4th 676, 687-688 (2014); *Shepard v. Edward Mackay Enters., Inc*., 148 Cal.App.4th 1092, 1101 (2007).

The Supreme Court has addressed whether employment agreements, without more, are governed by the FAA. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956), held that an agreement to arbitrate involving an employee employed by a New York corporation who entered into the agreement in New York, but ultimately performed services in Vermont, was not subject to the FAA as there was no showing the employment contract had any bearing on commerce. 350 U.S. at 200-201. The nature of Bernhardt's work was not relevant.

If activity is limited to a local market, the presence alone of a national entity does not support FAA preemption. See *Slaughter v. Stewart Enters.*, No. C 07-01157 MHP, 2007 U.S. Dist. LEXIS 56732, at *20 (N.D. Cal. 2007). "[T]he reaches of the Commerce Clause are not defined by the accidents of ownership." Ibid. There, the FAA did not govern a crematorium worker's employment claims because his duties were purely intra-state. Id. at *22-23. That the defendant owned and operated businesses in other states did "not undermine the conclusion that the activity is confined to local markets." Id. at *20. Similarly, in *H. L. Libby Corp. v. Skelly &*

Loy, 910 F.Supp. 195, 198 (M.D. Pa. 1995), the FAA did not govern because while "Libby is an Ohio corporation and Skelly is a Pennsylvania corporation, there is nothing to indicate that this contract involved commerce between two states. Rather, all correspondence arising out of the contract was within Pennsylvania …. [and] the services were performed in Pennsylvania …." 910 F.Supp. at 198 (citing *Merritt-Chapman & Scott Corp. v. Pa. Turnpike Comm'n*, 387 F.2d 768, 772 (3d Cir. 1967)).

The burden is on the Respondent, who has raised the affirmative defense of the Federal Arbitration Act, to prove that it applies. The "agreement to be bound by alternative resolution policy" expressly disclaims the existence of any contract. The document states: "Unlike the provisions of Company Employee Handbook, the terms of this Agreement to Be Bound by Altermative Dispute Resolution Policy are contractual in nature." Because of this language, the handbook, which contains the unilaterally imposed arbitration procedure, is not a contract. Thus, by its terms, the Federal Arbitration Act cannot apply because it only applies to agreements.

The Board must face the application of Section 7 to arbitration agreements that are not governed by the Federal Arbitration Act because, if the FAA does not apply, any restriction on group action is unconscionable under California law. See *Discover Bank*, 36 Cal.4th 148. This case squarely presents that issue and cannot be avoided.

V. AS LONG AS THE ARBITRATION AGREEMENT PROHIBITS RESORT TO COMBINED, GROUP, CONSOLIDATED, COLLECTIVE, JOINT, REPRESENTATIVE OR ANY OTHER FORM OF CONCERTED ACTVITY, IT IS UNLAWFUL

We separate this argument to emphasize both the limited nature of *Epic Systems* as well as the broad scope of the arbitration provision in this case.

The only exceptions in the FUAP are for "workers compensation claims, unemployment insurance claims or any claims that could be made to the National Labor Relations Board."

First, the exemption is limited to only the specifically named agencies described and apparently does not include OSHA, the Office of Special Counsel of the Attorney General of the United States, the California Labor Commissioner, the California Attorney General, and other

administrative agencies. Second, the policy precludes pursuit of any claim through the court system. Moreover, it gives the employer the freedom to force a claim into arbitration on the sole basis because those claims that are not resolved would have to go through the arbitration process. The employer can simply control the process by refusing to resolve it and then force the matter into arbitration.

For reasons argued in the Brief in Support of Exceptions and here, the policy is overbroad, even applying *Epic Systems*.

VI. IN A UNIONIZED CONTEXT, AN ARBITRATION AGREEMENT IS UNENFORCEABLE

There are several reasons why the arbitration procedure is unlawful in the union context.

First, it is unenforceable. See *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Second, unions have standing to bring many claims on behalf of members before various courts, administrative bodies and so on. See, e.g., *Social Servs. Union, Local 535 v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979), and *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544 (1996).

Third, the prohibition against any group claim would prohibit a union steward or union representative from representing an employee with respect to a disciplinary matter. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The Board must face the question of whether the prohibition in the agreement and the policy violate the Act because they would prohibit the union's intervention in any claim or dispute.

Nothing in *Epic Systems* waives the Union's right to bring class or collective or group actions as long as it meets the applicable standing requirements. Nor is there any claim that the Union has waived any such right. Because Tarlton had recognized at least two unions, the Board must face the question of whether *Epic Systems* can override the union's interests.

VII. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE UNDER STATE LAW

As we've pointed out above, the savings clause of the Federal Arbitration Act, assuming

it applies, voids an arbitration agreement that is otherwise unenforceable. Here, we apply the California doctrines of unconscionability, which are applicable even if the Federal Arbitration Act applies.

We suggest a few points of unconscionability. If, for example, the employer requires that the employees pay the court filing fees, that requirement imposes unnecessary expenses, as we argued in our brief.

First *Armendariz*, 24 Cal.4th 83, requires that the employer pay all the costs of arbitration, except those that might be incurred in a court proceeding. Again, because we are in California, an employee could proceed to the Labor Commissioner through the Berman process contained in section 98 of the California Labor Code, which would impose no costs whatsoever.

For example, the Alternative Dispute Resolution Policy requires that the employee pay "the reporter's transcript of the proceedings."[5] The employee would have to pay for a translator. A translator is provided for free in the Berman hearings.

There are many other additional favorable provisions of the Berman process recognized by the courts in California:

1. Assistance is provided to the claimant by the Labor Commissioner's office in filling out the Initial Report or Claim form and processing the claim;[6]
2. There is a simple and available Initial Report or Claim form to fill out;[7]
3. The Labor Commissioner publishes detailed instructions on how to fill out the form and explaining the various statutes involved;

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[5] Note that nothing in the language provides that the reporter's transcript costs can be allocated by statute or otherwise to the employer. It appears as though the employee has full responsibility for any transcript.

[6] Videos are available to assist wage claimants. Cal. Dep't of Indus. Relations, *How to file a wage claim*, https://www.dir.ca.gov/dlse/HowToFileWageClaim.htm (last visited Aug. 10, 2018).

[7] The form is available in English, Spanish, Chinese, Korean, Vietnamese, Tagalog, and Punjabi. For the English-language form, see https://www.dir.ca.gov/dlse/Forms/Wage/English.pdf.

4. The Labor Commissioner investigates the claim and has the discretion not to issue a Notice of Hearing, which limits unnecessary litigation for both parties;

5. The Labor Commissioner must decide within thirty days of the filing of the Initial Report or Claim whether a hearing will be held, no action will be taken, or an action will be initiated under section 98.3 of the California Labor Code;

6. If the Labor Commissioner decides to take the case, the Notice of Hearing must issue within ninety days;

7. After investigation, a Notice of Claim and Conference is issued. That Notice summarizes the claim and sets a conference before a Deputy Labor Commissioner to attempt to resolve the claim;

8. If the matter is not settled with the assistance of the Deputy Labor Commissioner, the Deputy prepares the complaint for the employee to sign;[8]

9. No discovery is permitted in the administrative process, except to the extent information is learned at the Conference both by the claimant and the employer;

10. Subpoenas for production of records at the Berman hearing are available and are issued by a Deputy Labor Commissioner;[9]

11. The Labor Commissioner unilaterally issues the Notice of Hearing setting the date and location and stating the issue(s) and the remedy;

12. The hearings are conducted informally (Cal. Lab. Code § 98(a));[10]

13. No pleadings are allowed except the complaint and an answer (Cal. Lab. Code § 98(d));[11]

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[8] *Cuadra v. Millan*, 17 Cal.4th 855, 861 (1998).

[9] Cal. Code Regs. tit. 8, § 13506.

[10] Cal. Code Regs. tit. 8, §§ 13502, 13505 and 13506.

[11] The Notice of Hearing includes the Complaint, which sets out the claim.

14. The Hearing Officer may assist the unrepresented employee or employer in presenting evidence and explaining the procedures and applicable law;[12]

15. The Labor Commissioner must make an interpreter available (Cal. Lab. Code § 105);

16. The hearing is recorded, and, if one party requests the transcript or recording, the other party is to be provided a copy free of charge;[13]

17. Informal rules of evidence are applied;[14]

18. The Order, Decision or Award must issue within fifteen days after the hearing (Cal. Lab. Code § 98.1);

19. The informality of the Berman process is preserved because the Administrative Procedure Act does not apply;

20. Any appeal must be filed within fifteen days from the service of the ODA;

21. If no appeal is timely filed, a judgment is automatically entered (Cal. Lab. Code § 98.2(e));

22. Legal representation may be provided for free to the wage claimant by the Labor Commissioner's office in the de novo appeal (Cal. Lab. Code § 98.4);

23. The appeal is de novo;

24. The appeal does not require the preparation of any pleadings except the Notice of Appeal, which is an available form;

25. No response is required by the wage claimant to the Notice of Appeal;

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[12] Cal. Dep't of Indus. Relations, *Policies and Procedures for Wage Claim Processing*, https://www.dir.ca.gov/dlse/policies.htm (last visited Aug. 10, 2018).

[13] Cal. Code Regs. tit. 8, § 13502.

[14] This reinforces the evidentiary burdens imposed on employers who do not maintain records required by law. *See Hernandez. v. Mendoza*, 199 Cal.App.3d 721 (1988); Cal. Code Regs. tit. 8, § 13502.

26. The trial court has the discretion to allow limited discovery, consistent with the de novo nature of the appeal;[15]

27. A bond is required to be secured by the employer in the amount owed in order to ensure prompt payment;[16]

28. An attorney representing the wage claimant on appeal can receive attorney's fees (Cal. Lab. Code § 98.2(c));

29. Interest runs on the ODA from the date wages were due and payable;[17]

30. A claimant can expand the issues beyond those presented at the hearing, subject to the discretion of the trial court;

31. The employer is not limited in its defenses;

32. The Labor Commissioner assists the wage claimant to collect "claims for wages, judgments, and other demands" in other states (Cal. Lab. Code § 103);

33. Special procedures exist for the collection of judgments entered by courts from Berman hearings. Cal. Lab. Code § 96.8.[18] The Labor Commissioner must enforce any judgment, and attorneys' fees are provided for a judgment creditor to enforce a judgment (Cal. Lab. Code § 98.2(k));

34. Employees can make wage assignments to the Labor Commissioner who then can collect the wage claims (Cal. Lab. Code § 96).

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[15] *Sales Dimensions v. Superior Court*, 90 Cal.App.3d 757 (1979).

[16] The failure to post the bond is jurisdictional, and any appeal without a bond must be dismissed. *See Palagin v. Paniagua Constr., Inc*., 222 Cal.App.4th 124, 127 (2013); Cal. Lab. Code § 98.2.

[17] A similar interest provision applies to any action for nonpayment of wages in court. Cal. Lab. Code § 218.6.

[18] Those procedures would not be available in arbitration because any successful claimant in arbitration would have to petition to confirm an arbitration award in order to obtain an enforceable judgment. No fees would be available for the enforcement of the award. *Cf.* Lab. § 98.2(j), (k) (providing for attorneys' fees to enforce judgments).

These favorable provisions reduce the costs for any claimant. Tarlton's arbitration agreement imposes additional costs, which are otherwise waived or not applicable for employees who proceed to the Berman process.

There are many provisions of the Labor Code that are only enforceable by the Labor Commissioner. None of these provisions of state law were adopted for the purpose of disfavoring arbitration. Rather, the Legislature crafted the enforcement mechanism to encourage the efficiencies and simplicity of having these issues resolved by the Labor Commissioner, a subject matter expert and part of an agency charged with enforcement of these statutes. Moreover, in effect, these provisions limit litigation, which is one of the fundamental reasons for arbitration itself. They foreclose class litigation. Consistent development and enforcement of state law through a specialized agency serves the interests of the state.

The Labor Commissioner does not provide a neutral adjudication process. She is charged with enforcing these laws on behalf of workers. The Berman statutes are an important part of that role. See Cal. Lab. Code § 50.5 ("One of the functions of the Department of Industrial Relations is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment.").

Sections 210, 218.7, 225.5, 226(f), 226.3-.5, 226.8, 238, 238.2-.4, 240, 245-250, 558, 1197.2, 1198.5(k) and 1741 of the California Labor Code, are examples of provisions that are not enforceable in court or arbitration but are only enforceable by the Labor Commissioner. See also *Hentzel v. Singer Co.*, 138 Cal.App.3d 290, 298-300 (1982). Some are subject to misdemeanor prosecution and two or more employees could not go to seek criminal prosecution.

In summary, the Board must consider the fact that the arbitration provision is unconscionable under state law.

VIII. THERE IS LIMITED IMPACT IN THE *BOEING CO.* DECISION

First, *Boeing Co.* cannot be applied in the context of the Federal Arbitration Act. As in

Epic Systems, the Federal Arbitration Act preempts the Act. The Supreme Court has made it clear that arbitration agreements must be "enforced according to their terms." See *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989). See also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). As a result, this agency may not apply its *Boeing Co.* standard but must apply the "as written" standard of the Federal Arbitration Act as applied by the Supreme Court.

Second, the Supreme Court has made it clear that state laws of unconscionability may be applied within the context of the Federal Arbitration Act.

Third, as written, the FUAP imposes substantial cost on the employee. The FUAP applies to all claims before any agency of any kind with only the specified exceptions. The FUAP applies with parties who are not the employer, but may be agents of the employer. The FUAP imposes a privacy requirement by stating that the proceedings **"**are held privately." See also other arguments made in the Brief in Support of Exceptions. Thus, as written, the FUAP interferes with Section 7 rights.[19]

Fourth, the Employer offered no business justification for the imposition of the FUAP. It offered no business justification through the existence of maintenance of the FUAP. Thus, there is no record whatsoever in this case of any business justification.

In summary, *Boeing Co.* cannot be applied for the reasons expressed above.

If, however, *Boeing Co.* were to be applied, the FUAP is plainly unlawful because, on its face, it interferes with the Section 7 activities. Alternatively, Tarlton has the burden of establishing a business justification. It utterly and intentionally failed to offer any.

IX. THE IMPOSITION OF THE FUAP IN RESPONSE TO SECTION 7 ACTIVITIES IS UNLAWFUL

Nothing changes the posture of this case with respect that the Board in its earlier decision found that the imposition of the FUAP was unlawful because it was imposed in light of and in

[19] And, as noted above, it interferes with the unfortunate right of employees to refrain from Section7 activity by, for example, opposing an effort by other employees to seek a change in the workplace.

response to Section 7 activities.[20] Nothing changes the current Board law that even lawful rules cannot be implemented in response to Section 7 activity. The Charging Party and the other participants in the lawsuit were plainly trying to organize the workers to remedy improper and unlawful conditions of employment. Tarlton chose to foreclose further efforts of workers to resolve workplace disputes by implementing the FUAP and the response was unlawful. Contrary to the suggestion of the General Counsel, the Board should not overrule precedent dating back to 1942 that concerted resort to third parties such as administrative agencies, courts, adjudicatory bodies, governmental agencies, prosecutors, labor commissioners, and so on is protected activity and for "mutual aid or protection."[21]

X. CONCLUSION

For the reasons suggested above and in our earlier briefs, the Board should reissue its decision rejecting application of *Epic Systems* and finding that the FUAP is unlawful or that the employer offered no business justification for it. Alternatively, it should be remanded to the ALJ to make appropriate findings if any of the business justifications can be established.[22]

Dated: December 19, 2018

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION

/s/ David A. Rosenfeld
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[20] The FUAP only applies to matters that are grievances. The FUAP unlawfully prohibits the Union from bringing a claim before an administrative agency, which may not be covered by the grievance procedure.

[21] Although the Board may not care, a ruling as broad as that sought by the General Counsel would protect unions from imposing arbitration agreements on its members, which would block duty of fair representation lawsuits and even NLRB charges.

[22] Those justifications should be limited to those expressed at the time the FUAP was implemented, not made up later.

CERTIFICATE OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 19, 2018, I served the following documents in the manner described below:

CHARGING PARTY'S ADDITIONAL POSITION STATEMENT

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler